IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-472

NICHOLAS BUR, Petitioner

v.

HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER and DENNIS CHIPMAN, Respondents

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NICHOLAS BUR
PRO SE
5663 NORTH CONSAUL PLACE
WHITEFISH BAY, WI 53217

SEPTEMBER 22, 1977

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NICHOLAS BUR, Petitioner v. HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER, and DENNIS CHIPMAN, Respondents.	PETITION FOR CERTIORARI to the UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays for certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered June 29, 1977.

Opinions Below

The unreported opinion of the Court of Appeals is appended to this petition. Also appended are three opinions of the United States District Court for the Eastern District of Wisconsin, the most recent of which is reported as 415 F. Supp. 335 and the other two are unreported.

Jurisdiction

The date and time of the judgment for which review is requested is June 29, 1977. Jurisdiction is conferred on this Court by 28 U.S.C. 1254 (1).

Questions Presented

1. Does an arrest warrant confer power to arrest on a charge transparently false?

2. When a police chief continues to insist on criminal prosecution for 18 months after being personally served with easily verifiable information that the charge is false, is that the same as personal involvement?

3. May police officers seize and handcuff a person charged with a misdemeanor when there is no apparent danger of escape or violence and the person arrested agrees to go voluntarily?

4. May police officers sworn to protect those who live or work in the community stand by and do nothing (except confer jurisdiction) while police officers from another jurisdiction arrest on a transparently false charge?

Constitutional Amendments Involved

ARTICLE VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions Involved

United States Code, 1970 edition, page 7571, Title 28, Sec. 1343:

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity

secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the p protection of civil rights, including the right to vote.

United States Code, 1970 edition, page 10283, Title 42, Sec. 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Wisconsin Statute 341.04 (1971, Volume 2, page 3434):

§ 341.04. Penalty for operating unregistered or improperly registered vehicle. Except during a state of emergency proclaimed under ch. 22:

(1) It is unlawful for any person to operate or for an owner to consent to being operated on any highway of this state any motor vehicle, mobile home, trailer or semitrailer or any other vehicle for which a registration fee is specifically prescribed unless at the time of operation the vehicle in question either is registered in this state or is exempt from registration.

(a) A vehicle may be operated by a private person after the date of purchase of such vehicle by such private person or after the date such person moved to this state if application for registration and certificate of title has been made.

(b) All vehicles subject to renewal of registration may be operated provided that application for reregistration has been made.

(2) Unless application for reregistration has been made as required by s. 341.32, it is unlawful for any person to operate or for the owner to consent to being operated on any highway of this state any registered vehicle the construction or use of which has been changed so as to make the vehicle subject to a higher fee than the fee at which it currently is registered or which is carrying a greater load than that permitted under the current registration.

(3) Any person violating subs. (1) or (2) may be fined not more than $200

or imprisoned not more than 6 months or both. In addition to imposing the penalty, the court shall order the offender to make applications for registration or reregistration and to pay the fee therefor.

Wisconsin Statute 946.41 (1971, Volume 2, page 4199):

§ 946.41. Resisting or obstructing officer

(1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in his official capacity and with lawful authority, may be fined not more than $500 or imprisoned not more than one year in county jail or both.

(2) In this section:

(a) "Officer" means a peace offi- or other public officer or public employe having the authority by virtue of his office or employment to take another into custody.

(b) "Obstructs" includes without limitation knowingly giving false information to the officer with intent to mislead him in the performance of his duty including the service of any summons or civil process.

(3) Whoever by violating this section hinders, delays or prevents an officer from properly serving or executing any summons or civil process, is civilly liable to the person injured for any

actual loss caused thereby and to the officer or his superior for any damages adjudged against either of them by reason thereof.

Statement of the Case

Petitioner bought a new 1972 Chevrolet auto September 24, 1971. He transferred his license plates from the car traded in to his new car, and application was made for registration and certificate of title in compliance with above quoted Wis. Stat. 341.04(1)(a). On October 5, 1971 a Milwaukee police officer ticketed petitioner for alleged violation of 341.04 and ignored petitioner's proof of compliance.

Petitioner lost the ticket and did not appear in court on the day specified, November 30, 1971, because he did not think it would be easy to find the right court and then get the ticket voided since he had not yet received his license stickers (though he had promptly mailed the registration fee with the application and title certificate).

Aside from receipt of the proper stickers (which provided for no gap in registration) nothing happened until 7:15 AM February 10, 1972 when petitioner received a telephone call from a Milwaukee police officer who said he had a warrant for petitioner's arrest. When petitioner tried to explain what had happened and suggested a check by teletype with the motor vehicle department, the caller interrupted and threatened to send a Whitefish Bay (the Milwaukee suburb where petitioner lives) squad car to arrest petitioner. When petitioner said that would be a silly waste of the taxpayers' money when all that was needed was a five or ten cent teletype message, the caller hung up. Petitioner expected his caller to check with the motor vehicle department, and believed that if he did hear from the Whitefish Bay police they would be helpful.

At 11 o'clock the next morning, February 11, 1972, two Milwaukee police officers and two Wauwatosa police officers came to petitioner's place of employment in Wauwatosa (another Milwaukee suburb) with a warrant charging "operating unregistered or improperly registered vehicle." In the presence of the two Milwaukee officers, defendants Gilbert and Kocher, and one Wauwatosa officer, defendant Chipman, petitioner offered to show his proper uninterrupted registration certificate and pointed to his car parked outside with proper uninterrupted license stickers. All three officers ignored this proof the charge was false and the two Milwaukee officers insisted that petitioner come with them. Petitioner agreed and went to get his coat followed by the two Milwaukee officers. As he finished putting on his coat in the main office in the presence of about 20 fellow employees petitioner was grabbed and pulled and handcuffed by first defendant Gilbert and then defendant Kocher who then drove petitioner to the Milwaukee jail where he was detained until released in the custody of his attorney at 5:30 PM.

The next morning petitioner made the first of his 16 scheduled court appearances to defend against this charge and the charge of resisting arrest (Wisconsin

Statute 946.41) which was also prosecuted until both charges were dismissed December 13, 1973. More than 18 months before the charges were finally dismissed petitioner caused the Milwaukee police chief, defendant Breier, to be personally served with four copies of written notice describing what had happened, protesting the false arrest and continuing criminal prosecution of the petitioner.

Petitioner's summons and complaint were filed in the United States District Court for the Eastern District of Wisconsin March 6, 1973 and named as defendants the cities of Milwaukee and Wauwatosa, Milwaukee police chief Breier and Wauwatosa police chief Howard, the two Milwaukee police officers and the two Wauwatosa police officers. Petitioner requested $2,500 in damages and injunctive relief restraining police chiefs Breier and Howard "from asking for arrest warrants under Wisconsin statute 341.04 unless defendants Breier and Howard first verify with the Wisconsin Motor Vehicle Department that the person to be arrested is in violation of 341.04" and "restraining defendants Breier and Howard from authorizing police officers under their orders to seize or handcuff persons charged with misdemeanors when there is no apparent danger of escape or violence and the person in custody agrees to go voluntarily with the officers."

Jurisdiction is based on 28 U.S.C. 1343 and 42 U.S.C. 1983.

On July 18, 1974 the District Court dismissed all the defendants except the two

Milwaukee police officers, Gilbert and Kocher.

On August 12, 1974 petitioner appealed to the United States Court of Appeals for the Seventh Circuit the dismissal of Milwaukee police chief Breier and Wauwatosa police officer Chipman. He did not appeal the other dismissals.

On February 20, 1975 the Court of Appeals dismissed the appeal for lack of an appropriate judgment under Rule 54 (b).

On June 23, 1976 the District Court granted the motion for summary judgment of the remaining two defendants, Milwaukee police officers Gilbert and Kocher.

Petitioner appealed July 22, 1976 to the Court of Appeals the dismissals of defendants Milwaukee police chief Breier and Milwaukee police officers Gilbert and Kocher and Wauwatosa police officer Chipman. On June 29, 1977 the Court of Appeals affirmed. Petitioner now requests certiorari.

Argument

Certiorari should be granted because the lower courts here decided important questions of federal law which have not been, but should be, settled by this Court.

1. Re question #1: Does a misdemeanor arrest warrant confer power to arrest on a charge transparently false?

The District Court stated (A. 16) "The time-honored test as to the lawfulness of

an arrest is whether the arrest is either with probable cause or pursuant to a warrant." Such power is dangerous to our liberties. In Milwaukee and elsewhere police now have power to get any warrants they want from magistrates who are their rubber stamps. For confirmation see Arrest by Wayne R. LaFave, Little, Brown and Company (1965) subtitled "The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States":

> "The assumption apparently is that greater protection for the individual is afforded by the warrant procedure, since an arrest will be made only if an impartial judicial officer, upon careful evaluation of the evidence presented to him, determines that adequate grounds for an arrest exist. But, at least in Kansas, Michigan and Wisconsin, it is clear that the warrant process does not serve this function." page 502, and on page 491: "Thus some appellate courts continue to stress that use of the arrest warrant is the preferred method for making an arrest, apparently oblivious to the fact that meaningful judicial review of the evidence prior to the issuance of the warrant is unknown in many localities."

Petitioner respectfully submits that meaningful judicial review of the flood of misdemeanor warrants is obviously impractical. Due process can only be satisfied by requiring the requestor of the warrant and the arresting officer to use ordinary common sense, or at least act in good

faith. The "time-honored test" should be modified by this Court.

2. Re question #2: When a police chief continues to insist on criminal prosecution for 18 months after being personally served with easily verifiable information that the charge is false, is that the same as personal involvement?

Here defendant Milwaukee police chief Breier was personally served with the same information that his officers, defendants Gilbert and Kocher, ignored when they arrested petitioner. Chief Breier also ignored proof of innocence and continued to sanction for another 18 months the criminal prosecution of petitioner. What is the difference between that and personal involvement? Is there a significant difference?

3. Re question #3: May police officers seize and handcuff a person charged with a misdemeanor when there is no apparent danger of escape or violence and the person arrested agrees to go voluntarily with the officers?

Here petitioner had agreed to go voluntarily but was seized by the two Milwaukee police officers, defendants Gilbert and Kocher, as petitioner finished putting on his overcoat in the main office in front of about 20 fellow employees. Petitioner then planted his feet and held his arms rigid at his sides while asking them to take their hands off and repeating he was going voluntarily. Is that unlawful resistance or merely understandable protest?

4. Re question #4: May police officers sworn to protect those who live and work in their community stand by and do nothing (except confer jurisdiction) while police officers from another jurisdiction arrest on a transparently false charge?

Wauwatosa police officer defendant Chipman did nothing but furnish jurisdiction, and then watch and listen and laugh while the two Milwaukee police officers, defendants Gilbert and Kocher, ignored proof of petitioner's innocence and dragged petitioner out the door handcuffed. Later he lied when he stated that petitioner shouted "I am not going to go." Defendant Chipman failed his duty to protect persons who live or work in Wauwatosa. Petitioner contends it is not necessary for a police officer to seize and handcuff to participate in an arrest.

Conclusion

The present warrant procedure in Milwaukee and elsewhere is counter-productive. Criminals escape or conceal evidence while police officers perform the red tape of getting a rubber-stamped warrant. A rubber-stamped warrant allows police to roust and jail citizens they know or should know are innocent.

Chiefs in charge of thousands of police officers appear to be immune and privileged to encourage and sanction violations of constitutional rights unless they themselves directly participate at the time of the violations.

There are no restrictions on police

power to seize and handcuff when they have a felony or misdemeanor arrest warrant.

Police have no duty to prevent outside police from making false arrests of their citizens.

Government employees at every stage of the administration of criminal justice scratch each other's backs to increase governmental power over persons outside government because they confuse deference to their authority with fidelity to law.

For these reasons petitioner respectfully requests certiorari.

nicholas Burr
September 22, 1977

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued February 23, 1977

June 29, 1977

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. ALBERT S. CHRISTENSEN, Senior District Judge*

NICHOLAS BUR, Plaintiff-Appellant, vs. No. 76-1870 CITY OF MILWAUKEE, et al., Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 73-C-105 John W. Reynolds, Judge.

O R D E R

Pursuant to 42 U.S.C. § 1983, plaintiff brought this pro se civil rights action for damages and for injunctive relief grounded on asserted violations of the Eighth, Ninth and Fourteenth Amendments.

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*Senior District Judge Albert S. Christensen of the District of Utah is sitting by designation.

The original defendants included the Cities of Milwaukee and Wauwatosa, Wisconsin, Milwaukee Chief of Police Harold A. Breier, Wauwatosa Chief of Police John Howard, Milwaukee police detectives Charles Gilbert and Dennis Kocher, and Wauwatosa police officers Dennis Chipman and Eugene Forster. Plaintiff does not attack the district court's dismissal of the two cities, Howard and Forster.

The complaint asserts that at 11:00 a.m. on February 11, 1972, Milwaukee detectives Gilbert and Kocher and Wauwatosa police officers Chipman and Forster arrested him at his place of business in Wauwatosa for previously operating an unregistered automobile and for resisting police officers in contravention of Sections 341.04 and 946.41 of the Wisconsin Statutes. Plaintiff asserts that even though he offered to accompany the Milwaukee policemen voluntarily, they first grabbed and handcuffed him before taking him to the Milwaukee jail and detaining him until 5:30 p.m. on that date. All charges were later dropped. Bur charged that Gilbert and Kocher had used excessive force and were careless, reckless and negligent. Breier and Howard were alleged to be negligent concerning the training and supervision of their subordinates. Bur claims that he sustained $2500 damages. He also asked the district court to enjoin Milwaukee police chief Breier and Wauwatosa police Chief Howard from asking for an arrest warrant under Section 341.04 of the Wisconsin Statutes (dealing with operating unregistered vehicles) without first verifying through the Wisconsin Motor Vehicle Department that the person to be

arrested is in violation of that statute. Further, plaintiff sought to enjoin Breier from authorizing police officers under his command to seize or handcuff persons charged with misdemeanors when there is no apparent danger of escape or violence and when the person in custody agrees to go voluntarily with the officers.

In his first opinion, Judge Reynolds dismissed the action against the two cities and Milwaukee police chief Breier and granted summary judgment to Howard, Chipman and Forster. Subsequently, the court granted plaintiff's motion to compel certain discovery from the remaining defendants. In a later opinion, he granted Gilbert and Kocher summary judgment. As noted, the appeal seeks reinstatement of the action against Breier, Gilbert, Kocher and Chipman. We affirm.

In granting Chipman summary judgment in his first opinion, Judge Reynolds noted that on the day of plaintiff's arrest, Chipman stayed in the reception area of plaintiff's office and did not participate in serving the arrest warrant on him or in arresting him for operating an unregistered vehicle and for obstructing an officer. Because Chipman was not shown to have acted in bad faith or to have used unreasonable force or to have subjected plaintiff to anything more than the indignity of being arrested, his motion for summary judgment was granted. It is uncontested that Chipman did not enter plaintiff's office and did not struggle with him or touch him or participate in his arrest. No physical injuries were said to have been inflicted by Chipman. However, plaintiff argues

that Chipman had a duty to step in and prevent his arrest, citing Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972). However, there the defendant police officers intentionally failed to protect Byrd from others who were violating his civil rights by beating him in their presence. In contrast, Chipman was not standing by while other officers were summarily punishing a third person in a blatantly unconstitutional manner. Bonner v. Coughlin, 545 F.2d 565, 568-569 (7th Cir. 1976)(en banc). Since the arrest warrant had been issued by a judicial officer, Chipman was not required to question its validity. Commonwealth of Pennsylvania ex rel. Feiling v. Sincavagl, 439 F.2d 1133 (3rd Cir. 1971). Summary judgment for Chipman was properly granted.

Plaintiff next questions the district court's dismissal of Milwaukee police chief Breier in the face of the alligation that he was negligent in training and supervising detectives Gilbert and Kocher. To implicate Breier, plaintiff depends on the doctrine of respondeat superior. However, it is well settled that there cannot be a recovery under the Civil Rights Acts through application of that doctrine. McDonald v. Illinois, ____ F.2d ____, No. 76-1265 (7th Cir. June 15, 1977), slip op. at 13; Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir. 1973), certiorari denied, 414 U.S. 1033; Adams v. Pate, 445 F.2d 105, 107 (7th Cir. 1971); Jennings v. Davis, 476 F.2d 1271, 1274 (8th Cir. 1973); Draeger v. Grand Central, Inc., 504 F.2d 142, 45 (10th Cir. 1974); see also Rizzo v. Goode, 423 U.S. 362, 375-376. Moreover mere negligence cannot support a Section

1983 claim in this Circuit. Bonner v. Coughlin Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc). Therefore, the action was properly dismissed as to Breier.

With respect to detectives Gilbert and Kocher, the opinion granting them summary judgment points out that they served an arrest warrant upon plaintiff after he failed to appear in Milwaukee County Court pursuant to a traffic citation and complaint with respect to his operating an improperly registered motor vehicle.1/ A judge of that court ordered that a warrant be issued for his arrest on November 30, 1971, and the warrant was issued and signed by a court commissioner on February 4, 1972. This warrant was duly forwarded by a member of the Milwaukee police department to the warrant detail of the detective bureau of that department. It was pursuant to that warrant that Gilbert and Kocher appeared at plaintiff's place of business on February 11 and advised him of the existence of the warrant.

The district court held that plaintiff's arrest was lawful because it was pursuant to a warrant valid on its face, so that

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1/ Bur did not appear in Milwaukee County Court on November 30, 1971, as the citation notified him to do. At oral argument, Bur maintained he failed to appear because he thought an effort "to beat" the ticket, on Section 341.04 grounds would be useless until he had his new license plate stickers (which were sent with the new registration) to show to the county judge. See note 2 infra.

the detectives did not need to have probable cause to arrest him. Morrison v. United States, 262 F.2d 449, 452 (D.C. Cir. 1958). As the district court correctly noted, the proper place for plaintiff to plead any defense to the offense charged was in court rather than to the officers whom the warrant authorized and, indeed, compelled to make the arrest.2/

As to plaintiff's claim that the arrest was effectuated with excessive force, the district court noted that plaintiff only suffered an abrasion on his wrists from the handcuffs. In his deposition Bur conceded he gave some physical resistance (Dep. 22-23). Even without any resistance by an arrestee, the use of such minimum force is common in the course of an arrest. As the court observed, handcuffing cannot form the basis of a complaint under Section 1983 and, here, where there was

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2/ Bur had purchased a new car in September 1971. In October 1971, the traffic citation was issued for driving an unregistered vehicle. Bur could not register the car until he received his title papers. Under Wisconsin law, plaintiff maintains that a new car may be operated "if application for registration and certification of title has been made." Wisc. Stat. § 341.04. The fact that Bur's car had been registered subsequent to the citation did not affect the facial validity of the warrant for the previous offense. Production of proof of registration to the arresting officers therefore could not in any way negate the good faith of the arrest.

admittedly some resistance, this conclusion follows a fortiori. Taylor v. McDonald, 346 F.Supp. 390, 395 (N.D. Tex. 1972).

The orders in question are affirmed.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

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NICHOLAS BUR, Plaintiff,

vs. No. 73-C-105

CHARLES GILBERT and
DENNIS KOCHER, Defendants.

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MEMORANDUM OPINION AND ORDER

This pro se action is brought under 42 U.S.C. § 1983 and arises out of the plaintiff's arrest by Milwaukee police detectives on February 11, 1972. The arrest was made by police officers of the City of Milwaukee, but took place in the City of Wauwatosa. The complaint originally named as defendants the cities of Milwaukee and Wauwatosa, the chiefs of the police departments of both cities, two Wauwatosa police officers who accompanied the Milwaukee police officers to the scene of the arrest and the two Milwaukee police detectives who actually made the arrest. In a decision and order dated July 18, 1974, this Court dismissed the action as to both city defendants and the Milwaukee police chief and granted summary judgment in favor of the Wauwatosa police chief and both Wauwatosa police officers. The two Milwaukee police detectives, Charles Gilbert and Dennis Kocher, are thus the only defendants remaining in this action.

With respect to the remaining defendants, the complaint seeks $2500 in damages for the unlawful arrest of the plaintiff on charges of operating an unregistered or improperly registered motor vehicle, § 341.04, Wis. Stats., and resisting or obstructing an officer while such officer is doing an act in his official capacity and with lawful authority, § 946.41, Wis. Stats. The complaint also alleges that unnecessary and excessive force was used by those defendants in effectuating the aforementioned arrest. On December 11, 1975, defendants Gilbert and Kocher moved for an order granting summary judgment in their favor and against the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons hereinafter stated, the Court has concluded that the defendants' motion must be granted.

From the pleadings and papers on file in this case, and from the affidavits and documents submitted in support of and in opposition to the motion for summary judgment, the following facts appear: On October 5, 1971, the plaintiff was issued a traffic citation and complaint in the form prescribed by § 345.11, Wis. Stats. The citation and complaint was signed by Officer Carl Karwack, and charged the plaintiff with a violation of § 341.04, Wis. Stats. The citation and complaint further notified the plaintiff that he had to appear in Branch 3 of the Milwaukee County Court, Room 635, Milwaukee County Courthouse, at 8:30 A. M. on November 30, 1971. The citation and complaint was subsequently sworn to before a Milwaukee County Court Commissioner, Herbert Schultz,

on November 11, 1971, and filed with the clerk of court for the Milwaukee County Court on November 24, 1971.

The car the plaintiff was driving when he received the citation was a 1972 Chevrolet purchased 11 days earlier, on September 24, 1971, from the Humphrey Chevrolet Company. It appears that Humphrey Chevrolet undertook to arrange for the mechanics of transferring the title for the 1972 Chevrolet to the plaintiff. As is permissible in Wisconsin, the plaintiff physically transferred his license plates from a 1968 Ford, which was his "trade-in" for the 1972 Chevrolet, to the latter vehicle. These plates expired at the end of September 1971, but the plaintiff believed that a title certificate was necessary before the registration plates on the 1972 Chevrolet could be renewed. Plaintiff nevertheless thought (and indeed, presently maintains) that operation of the 1972 Chevrolet on and after October 1, 1971, was sanctioned by § 341.04(1)(a), Wis. Stats:

> "A vehicle may be operated by a private person after the date of purchase of such vehicle by such private person *** if application for registration and certificate of title is made."

The plaintiff asserts that he tried to explain for foregoing facts to Officer Karwack on October 5, 1971, but that Karwack nevertheless issued the citation and complaint. Thereafter, on October 18, 1971, the plaintiff received his title certificate for the 1972 Chevrolet, and mailed the title certificate, application

form, and registration fee to the State of Wisconsin.

Plaintiff claims that he did not appear in Milwaukee County Court as directed by the citation and complaint for two somewhat inconsistent reasons: (1) he had lost his copy of the citation, and (2) he had not yet received his new license plate stickers, and believed that until he had such stickers to display to the county court judge, the traffic citation would not be voided. Upon the plaintiff's failure to appear on November 30, 1971, Judge Louis J. Ceci ordered that a warrant be issued for his arrest. A warrant was subsequently issued, signed by Court Commissioner Herbert Schultz, on February 4, 1972. Although § 345.37, Wis. Stats. provides that "{i}f the defendant fails to appear in court at the time fixed in the citation *** (1) *** the court may issue a warrant under ch. 968," it does not specify what provision of Chapter 968 is applicable. While § 968.09, Wis. Stats. authorizes the issuance of a bench warrant of arrest upon a defendant's failure to appear as required, the warrant of arrest in this case appears to have been based on the substance of the citation previously issued to the plaintiff -- i.e., a violation of § 341.04, Wis. Stats. on October 5, 1971.

Meanwhile, on January 2, 1972, the plaintiff had received his certificate of registration and license plate stickers. On February 10, 1972, Officer Richard L. Kramer of the Milwaukee Police Department called the plaintiff at his home and informed him that the police department was in possession of a warrant for his arrest.

At this point, the affidavits differ as to what next occurred: The plaintiff claims that he tried to explain the situation to Officer Kramer, whereupon Kramer hung up. Kramer, in turn, asserts that he advised the plaintiff that he could appear at either the Traffic Bureau or the Fifth District Police Station of the Milwaukee Police Department, and that failing a voluntary appearance, the warrant would be served upon the plaintiff at his home, at which time he would be taken into custody. Kramer further asserts that the plaintiff then stated that he would not voluntarily appear to answer the warrant. The plaintiff denies that Kramer told him of his option of voluntary appearance, or that he told Kramer he would refuse to so appear.

Thereafter, Officer Kramer forwarded the warrant for the plaintiff's arrest to the Warrant Detail of the Detective Bureau of the Milwaukee Police Department. The following day, February 11, 1972, Detectives Gilbert and Kocher appeared at the plaintiff's place of business, an office building located at 2747 North Mayfair Road, Wauwatosa, Wisconsin. They met the plaintiff in the reception area of the office building, advised him of the existence of the warrant, and placed him under arrest. Once again, the affidavits at this point differ as to what next occurred: The plaintiff maintains that he tried to explain the situation to the defendants, pointing out the certificate of registration in his possession and the then-current registration stickers on his car. When the defendants insisted on following through on the warrant, the plaintiff claims he stated that he would go along

voluntarily. As he was putting on his coat, however, the plaintiff maintains that the defendants "grabbed and pulled" him, and then handcuffed him. The defendants, in contrast, claim that they allowed the plaintiff time to get his coat, and that only after a period of time had thereafter expired did they take the plaintiff by the arm to escort him from his office. The defendants assert that the plaintiff then started to struggle with them, whereupon he was placed in handcuffs. One of the attending Wauwatosa officers states that he entered the plaintiff's office after hearing shouting, and observed the plaintiff holding on to a desk and hear him shouting: "I am not going to go!" The plaintiff, in turn, denies holding onto a desk or making any such statement.

After being taken into custody, it appears that the plaintiff was detained for six and one-half hours before being released. Although the complaint states that the plaintiff was arrested not only for the registration offense upon which the warrant of arrest was based, but also for resisting or obstructing an officer, it does not appear that anything ever came of this latter charge. The registration offense was subsequently prosecuted, but eventually was dismissed by the district attorney on December 12, 1973.

The foregoing statement of facts is a sorry tale of an unfortunate and confused confrontation between a citizen and his government. At all times, it appears that the plaintiff honestly believed that he was innocent of the charged violation of

the motor vehicle laws, and if the plaintiff's affidavit is truthful, attempted to explain his position in turn to Officer Karwack, who issued the citation, to Officer Kramer, who called the plaintiff to inform him of the warrant, and to detectives Gilbert and Kocher, who executed the warrant. Despite this belief in his innocence, and his attempts to explain, the plaintiff was subjected to the indignity and humiliation of being arrested and handcuffed at the place of his business, and the embarrassment of temporary incarceration. Conversely, from the point of view of the government, the plaintiff had failed to appear at a scheduled court hearing of the underlying charge, and if Officer Kramer's affidavit is truthful, refused to agree to voluntarily appear to answer the then outstanding arrest warrant.

But in passing upon the defendants' motion for summary judgment, it is not necessary or proper for this Court to determine whether one party was "right" and another party "wrong." Plaintiff bases his suit on 42 U.S.C. § 1983, and in ruling on the defendants' motion for summary judgment, the Court should look only to see whether on the basis of the undisputed material facts it can be said as a matter of law that the defendants have not deprived the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws." Plaintiff maintains that his rights under the Eighth, Ninth, and Fourteenth Amendments to the United States Constitution were violated by the defendants. On the basis of undisputed facts, the Court has concluded that the plaintiff's claim cannot withstand the

defendants' motion for summary judgment.

As previously noted, it does not appear that the charge of resisting or obstructing an officer was ever pursued, and neither party has addressed this aspect of the plaintiff's complaint. The Court assumes, however, that a finding that the arrest on the § 341.04 warrant was proper will obviate the necessity of determining whether the concurrent warrantless arrest for resisting or obstructing an officer was itself supported by probable cause. Cf. Daly v. Pedersen, 278 F. Supp. 88, 92 (D. Minn. 1967).

As a starting point, the Court notes that the element of excessive or unnecessary force is not a prerequisite to or otherwise an essential element of recovery under § 1983. See, e.g., Droysan v. Hansen, 59 F.R.D. 483 (E.D. Wis. 1973); Hampton v. City of Chicago, 484 F. 2d 602, 609 (7th Cir. 1973), cert. denied 415 U. S. 917 (1974); Beauregard v. Wingard, 230 F. Supp. 167, 177 (S.D. Cal. 1964). Conversely, the use of excessive force in the context of an arrest, albeit an arrest that is itself lawful, is actionable under § 1983. See, e.g., Clark v. Ziedonis, 513 F 2d 79 (7th Cir. 1975); Everett v. City of Chester, 391 F. Supp. 26 (E.D. Pa. 1975). The grounds asserted by plaintiff in support of his recovery are thus independent and severable, and the Court will accordingly consider them separately.

Plaintiff's first theory of recovery is that his arrest on February 11, 1972 was itself unlawful. As previously mentioned, it is plaintiff's position that at no time

was he ever in violation of § 341.04 -- that on October 5, 1971, his operation of a vehicle without a then-current registration was authorized by § 341.04(1)(a), and that on February 11, 1972, his car was registered in compliance with § 341.04(1). Plaintiff further claims that the facts establishing his innocence were brought to the attention of both the officer issuing the citation and the detectives making the arrest. Plaintiff's ingenuous argument is that if he was innocent of the offense charged, how can his arrest for that charge be lawful?

An arrest must meet constitutional standards to relieve the law officer from possible civil liability under § 1983. Taylor v. McDonald, 346 F. Supp. 390, 393 (N.D. Tex. 1973). The innocence per se of the arrestee is not decisive: "A police officer who arrests someone *** is not liable *** simply because the innocence of the suspect is later established." Perry v. Jones, 506 F 2d 778, 780 (5th Cir. 1975). Conversely, the guilt of the suspect is not a defense. The time-honored test as to the lawfulness of an arrest is whether the arrest is either with probable cause or pursuant to a warrant. "As a general rule an arrest, lacking an appropriate warrant or without probable cause, constitutes a violation of due process giving rise to a claim under § 1983." Daly v. Pedersen, 278 F Supp. 88, 91 (D. Minn. 1967).

In the absence of a warrant, the existence of probable cause is decisive: "{A}n arrest made without a warrant does not violate the Constitution only if 'at the moment the arrest was made, the officers had

probable cause to make it -- {if} at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the {suspect} had committed or was committing an offense.'" Taylor v. McDonald, 346 F. Supp. 390, 393-394 (N.D. Tex. 1972).

In contrast, where an arrest is made pursuant to a warrant, the relevant inquiry is not into whether or not there was probable cause to make the arrest, but whether or not the warrant pursuant to which the arrest was made was valid. Moreover, the nature of the inquiry into the validity of a warrant is different in a situation where the question is the validity of the warrant for purposes of subsequent criminal proceedings than it is where, as here, the question presented is the lawfulness of the arrest for purposes of holding the arresting officer liable for damages. In the former situation, a court might well look back to circumstances preceding the issuance of the warrant, for it is the warrant itself which is in question; in the latter circumstances, the inquiry is not into the validity of the warrant per se, but rather the propriety of the officers effectuating an arrest pursuant to it. In that situation, the officers need only determine whether the warrant is valid "on its face."

> "An officer is protected and justified in executing process fair on its face--that is, process that is issued by a court, magistrate, or body having authority of law to

> issue process of that nature, is legal in form, and contains nothing to notify or fairly apprise the officer that it is issued without authority. If the process is fair on its face it matters not that it is irregular, and voidable for such irregularity..."
> 32 Am. Jur. 2d, False Imprisonment § 67 (1967).

> "It is the duty of the officer to carry out without delay the commands of a warrant which is valid in form and issued by a court of competent jurisdiction, and where a warrant is valid on its face, the officer is under no duty to inquire further into its basis or alleged invalidity before making the arrest..."
> 6A C.J.S., Arrest § 7 (1975).

Plaintiff does not, nor could he in the context of this lawsuit, challenge the issuance of the warrant in question. Nor does the plaintiff argue that the warrant in question was legally defective in form or "on its face," Instead, he maintains that the defendants were informed of circumstances at the time of his arrest which were sufficient to give the arresting officers probable cause to believe that the violation for which the warrant had been issued had in fact not occurred. In effect, plaintiff asserts that the existence of a warrant does not vitiate the requirement that an arresting officer with a warrant must nevertheless not have probable cause to arrest, or perhaps more accurately, that an arresting officer with

a warrant must nevertheless not have probable cause not to arrest. Whatever practical appeal such a requirement might have must be weighed against the fact that such a requirement pits the arresting officer against the decision of the judicial authority issuing the warrant, in effect compelling him to disobey the judicial order to arrest unless he himself can ascertain that an arrest is in order. Aside from the inherent conflict between the official issuing the warrant and the person executing the warrant which such a requirement would engender, the person executing the warrant is often ill-placed to make such a determination. It would be absurd to require an arresting officer to engage in argument with the person to be arrested when a judicial officer has previously determined that probable cause to arrest exists. Moreover, it is not the law:

> "A warrant of arrest is issued by so some official authorized by law to perform that duty, usually a magistrate, and it directs the police or other officer to arrest the named person. For example, a Commissioner's warrant in this jurisdiction begins with the words: 'You are hereby commanded to arrest {the defendant}.' Thereafter the police officer has no concern whatever with the question whether the person should or should not be arrested. The officer with a warrant has one duty and one duty only; he is to arrest the person." Morrison v. United States, 262 F. 2d 449, 452 (D.C. Cir. 1958) (footnote omitted).

Accord, Link v. Greyhound Corp., 228 F. Supp. 898, 901 (E.D. Mich. 1968). The Court must conclude in the circumstances of this case that the defendants' arrest of the plaintiff pursuant to the authority of the warrant in question was not violative of the plaintiff's constitutional rights, and that the plaintiff can thus not recover under § 1983.

The Constitution requires that an arrest be supported by probable cause. In the absence of a warrant, the probable cause determination must be made by the arresting officer. But where a warrant does exist, the existence of probable cause has previously been determined by a judicial officer, and the Constitution does not require that that determination be duplicated by the officer executing the warrant. If the person named in the warrant has a defense to the offense charged, that defense can in due course be presented to a judicial official. But the proper place for the arrestee to plead his cause is in court, and not to the officer whom the warrant authorizes and compels to make the arrest.

Plaintiff's second ground of recovery is that the arrest was effectuated with unnecessary and excessive force. From the record, it does not appear that the plaintiff suffered any injuries, other than an abrasion on his wrists from the handcuffs. For the purposes of this decision, the Court will assume, without finding, that the plaintiff was handled discourteously and that the use of handcuffs in this situation was unnecessary. The fact remains, however, that the use of such minimal

force is not uncommon or unusual in the course of an arrest. For the Constitution to be violated, the force used must be excessive. While the law does not require that serious or permanent injuries result, the law does require that the force used be more than the mere technical "battery" that is inextricably a part of any arrest:

> "The courts have taken cognizance of physical beatings and violence resulting in deprivations of due process. *** Because of the brutality of the attacks in those cases, there were clear deprivations of due process. Here, however, plaintiff has neglected to allege any more than a trivial battery at best. *** In approaching Fourteenth Amendment due process questions, the court may consider the severity of the act. While it is true that the Civil Rights Act is to be read in the context of tort liability, *** nevertheless, the plaintiff herein has failed to show the requisite degree of harm needed to constitute a denial of rights 'implicit in the concept of ordered liberty.' *** Many, if not most, arrests are bound to involve some touching of the person of the arrested person by the officer. It becomes a 'battery' in violation of the Constitutional Rights only when excessive under the circumstances, certainly if the arrest be a lawful one."

Daly v. Pedersen, 278 F. Supp. 88, 94 (D. Minn. 1967). (citations omitted).

In a similar manner, it has been held that mere handcuffing, without more, cannot form the basis of a complaint under § 1983. Taylor v. McDonald, 346 F. Supp. 390, 395 (N.D. Tex. 1972).

Granted, a minimal battery and handcuffing incident to arrest might well be offensive to the sensibilities of a responsible and law-abiding citizen. But given that the initial arrest has been determined to have been a deprivation of liberty in accordance with due process, the secondary effects of the use of minimal force incident to that arrest is not violative of the due process provision of the Fourteenth Amendment. Nor can it be said that such force amounts to cruel and unusual punishment, in violation of the Eighth Amendment rights of the plaintiff. Cf. Anderson v. Nosser, 438 F. 2d 183 (5th Cir. 1971), modified en banc 456 F. 2d 835 (1972), cert. denied 409 U. S. 848 (1972).

The crux of the plaintiff's claim is really that a formal arrest and handcuffing was excessive, given that the underlying offense amounted to no more than a traffic offense. With this position, the Court is not toally unsympathetic. An arrest is a significant and substantial deprivation of a person's liberty, and it seems queer that the deprivation is essentially the same, regardless of whether the underlying offense is jaywalking or murder. As a logical matter, probable cause to believe an offense has been committed does not vary in proportion to the severity of the offense, and as a practical matter, the resulting arrest is equally intrusive. It may well be that common sense dictates

that the severe and drastic process of arrest be reserved for crimes more serious than the one herein involved. But that is not the law. Indeed, in a related field the Supreme Court has recently held that a full search of the person may be conducted incident to every custodial arrest, without regard to the seriousness of the offense occasioning the arrest. See United States v. Robinson, 414 U. S. 218 (1973); Gustafson v. Florida, 414 U. S. 260 (1973). A full search of the person is a serious intrusion into the privacy of the person arrested, and is substantially above and beyond the admittedly significant intrusion involved in the mere fact of arrest. In Robinson, the arrestee had been driving with a revoked license; in Gustafson, the arrestee was charged with not having his driver's license in his possession. If such minimal violations can lawfully be the occasion for a full search of the person incident to arrest, it would be anomolous for this Court to hold that such violations cannot support a simple arrest, unaccompanied by a search. Similarly, it would be anomolous to hold that a technical battery and handcuffing, which are substantially less intrusive than a full search of the person, somehow constitute excessive or unnecessary force when the contemporaneous arrest is for a simple traffic violation.

The Court accordingly holds that in the circumstances of this case, accepting as true the plaintiff's version of the disputed facts relative to the amount of force used by the defendants on February 11, 1972, the plaintiff has no right to recovery under § 1983.

One final matter is deserving of mention. The Milwaukee Chief of Police was originally dismissed as a defendant in this case on the ground that his alleged negligence in training and supervising the arresting officers was insufficient "personal involvement" for him to be liable to the plaintiff under § 1983. (Decision and Order of July 18, 1974, at 2-3) In his affidavit in opposition to the defendants' motion for summary judgment, the plaintiff asserts that the Chief of Police was personally served with copies of the notice of damages which § 895.43, Wis. Stats. requires as a prerequisite to a tort suit against governmental officers. Plaintiff then asserts that the failure of the Chief of Police to take action on his damage claim amounts to "personal involvement." The damages plaintiff seeks are for the arrest and accompanying battery and handcuffing on February 11, 1972; the notice of damages was served on the Chief of Police on June 9, 1972. Assuming plaintiff's rights had been violated by defendants Gilbert and Kocher on the former date, it is highly questionable whether the failure of the Chief of Police to respond to the claim for damages on the latter date is independently actionable under § 1983. See Rizzo v. Goode, 44 U.S. L.W. 4095 (Sup. Ct. January 21, 1976). But it is beyond peradventure that the failure of the Chief of Police to respond on the latter date can in no way be logically related to or made a part of the actions of defendants Gilbert and Kocher on the former date. Construing this portion of the plaintiff's affidavit in opposition to the motion for summary judgment as a request to rejoin the Milwaukee Chief

of Police as a defendant in this action, such request is denied.

For the aforementioned reasons,

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment in favor of the defendants and against the plaintiff is granted.

Dated at Milwaukee, Wisconsin, this 23rd day of June, 1976.

/s/ John W. Reynolds
U.S. District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

- -

NICHOLAS BUR,
Plaintiff

v. DECISION AND ORDER

CHARLES GILBERT and DENNIS KOCHER,
Defendants

Civil Action
No. 73-C-105

- -

In this action plaintiff alleges that he was unlawfully arrested on February 11, 1972, on charges of operating an unregistered or improperly registered vehicle, in in violation of § 341.04, Wis. Stats., and for resisting or obstructing an officer, in violation of § 946.41, Wis. Stats. Plaintiff seeks monetary and injunctive relief for the alleged deprivation of his constitutional rights. Jurisdiction is claimed under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. Plaintiff is proceeding pro se

In a previous decision and order, this Court dismissed plaintiff's action against all but two defendants. The remaining defendants, Charles Gilbert and Dennis Kocher, are the two Milwaukee police detectives who made the arrest in question.

The plaintiff has moved for an order compelling answers to certain questions

asked at the depositions of Charles Gilbert and Harold A. Breier, Chief of Police of the City of Milwaukee. Plaintiff also asks for an order directing the production of certain documents.

We will consider in order the contents of plaintiff's discovery motion. For the reasons hereinafter stated, portions of the motion will be granted and the remainder denied.

The plaintiff first seeks to compel Chief Breier to answer three questions directed to the training police officers receive with respect to the ticketing of illegally or improperly registered motor vehicles. As pointed out by the defendants in their brief in opposition to the motion to compel discovery, these questions were substantially answered by Chief Breier's responses to later questions.

Plaintiff next seeks to compel Chief Breier to answer two questions pertaining to police rules and regulations governing the swearing out of arrest warrants for the offense of operating an illegally or improperly registered motor vehicle. Once again, defendants' brief demonstrates that Chief Breier's answers to subsequent questions adequately provide the information that plaintiff has requested.

The defendants object to the next two questions plaintiff seeks to have answered on grounds that they are irrelevant, seek the discovery of privileged information, and are not designed to lead to the discovery of admissible evidence. Those two questions, as set forth in plaintiff's

motion (page 2) are:

> "6. Are you aware of previous instances of complaints of officers using unreasonable force in arresting for a traffic violation or a misdemeanor based on an unregistered or improperly registered vehicle? (page 24)
>
> "7. Are you aware of Detective Gilbert's record as to the absence or presence of complaints against him and infractions by him? (page 24) (And plaintiff requests that Chief Breier be compelled to enumerate and describe such complaints and infractions)."

The Court concludes that the first of these two questions is relevant, designed to lead to the discovery of admissible evidence, and does not involve privileged information. The Court will accordingly grant plaintiff's motion with respect to this question.

The Court will also grant plaintiff's motion with respect to the second question, but only insofar as such question requests information concerning complaints against defendant Gilbert which are similar in nature to the subject matter of plaintiff's suit, i.e., complaints regarding unlawful arrests or the use of excessive force, in connection with an arrest or otherwise. Such information is relevant to the instant case, and if not admissible therein, may well lead to the discovery of admissible evidence. Although the defendants claim a privilege as to this information,

they have failed to cite an authority or otherwise sustain this claim.

The final question plaintiff seeks to compel Chief Breier to answer is argumentative and is directed to Chief Breier's personal philosophy. It is not designed to elicit factual matters, and the Court will not order that it be answered.

The first question the plaintiff seeks to compel defendant Gilbert to answer pertains to the defendant appearing to defend himself before the Police and Fire Commission. The Court will grant plaintiff's motion with respect to this question, but only insofar as the question is directed to appearances relating to matters similar to unlawful arrest or the use of excessive force.

The second and third questions plaintiff seeks to compel defendant Gilbert to answer are relevant to the subject matter of this action. "The cases make it quite clear that relevance is not to be measured by the precise issues framed by the pleadings, but by the general relevance to the subject matter." 4 Moore's Federal Practice, ¶ 26.56{1}, p. 26-120 and 26-122 (2d ed. 1975).

The final question plaintiff seeks to compel defendant Gilbert to answer relates to police procedures governing the execution of arrest warrants. As set forth in the defendants' brief, Gilbert's responses to subsequent questions adequately answer the substance of plaintiff's question.

Plaintiff also seeks the production of

police department instructions, rules and regulations pertaining to the issuing of tickets and the obtaining of arrest warrants for persons operating illegally or improperly registered vehicles; department instructions, rules and regulations as to the amount of force to be used in misdemeanor arrests; and department records of complaints against and infractions by defendant Gilbert. For reasons previously stated, the production of these documents will be ordered with the exception that records of complaints against or infractions by defendant Gilbert need not be produced if such do not involve matters similar to unlawful arrest or the use of excessive force.

IT IS THEREFORE ORDERED that plaintiff's motion to compel answers to questions propounded to Chief Breier is denied as to those questions designated by plaintiff as 1, 2, 3, 4, 5, and 8; granted as to question 6; and granted as to that part of question 7 relating to unlawful arrests, excessive force, and related or similar matters.

IT IS FURTHER ORDERED that plaintiff's motion to compel answers to questions propounded to defendant Gilbert is denied as to question 4; granted as to questions 2 and 3; and granted as to that part of question 1 relating to unlawful arrests, excessive force, and related or similar matters.'

IT IS FURTHER ORDERED that plaintiff's motion for an order compelling the production of documents is granted with the exception that those portions of department

records dealing with complaints against or infractions by defendant Gilbert for matters unrelated to unlawful arrest or the use of excessive force need not be produced.

IT IS FURTHER ORDERED that there will be no award of the cost and expenses of bringing or opposing this motion.

Dated at Milwaukee, Wisconsin, this 26th day of November, 1975.

/s/ John W. Reynolds
U.S. District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

- -

NICHOLAS BUR,
Plaintiff,

v. DECISION AND ORDER

CITY OF MILWAUKEE, CITY OF WAUWATOSA, HAROLD A. BREIER, JOHN HOWARD, CHARLES GILBERT, DENNIS KOCHER, DENNIS CHIPMAN, and EUGENE FORSTER,
Defendants.

Civil Action No. 73-C-105

- -

In this action plaintiff alleges that he was unlawfully arrested on February 11, 1972, on charges of operating an unregistered or improperly registered vehicle (in violation of § 341.04, Wis. Stats.) and for resisting or obstructing an officer (in violation of § 946.41, Wis. Stats.). Plaintiff seeks monetary and injunctive relief for the alleged deprivation of his constitutional rights. Jurisdiction is claimed under 28 U.S.C. § 1343 and 42 U.S.C. § 1983. Plaintiff is proceeding pro se.

The defendants are as follows: the City of Milwaukee; the City of Wauwatosa; Harold A. Breier, the Milwaukee Chief of Police; John Howard, the Wauwatosa Police Chief; Dennis Chipman and Eugene Forster, two Wauwatosa Police officers; and Charles Gilbert and Dennis Kocher, two Milwaukee police detectives.

Presently pending before the court are motions of the City of Milwaukee and Harold A. Breier to dismiss this action as to them, and the motion for summary judgment of defendants John Howard, Eugene Forster, and Dennis Chipman.* These motions are granted. In addition, I dismiss this action as to the defendant City of Wauwatosa.

I.

Firstly, the complaint against the two municipal corporations, Milwaukee and Wauwatosa, must be dismissed for lack of jurisdiction. Title 28 U.S.C. § 1343 does not confer jurisdiction on this court for an action against a municipal corporation. In City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Supreme Court recently clarified that municipal corporations are not "persons" for purposes of the Civil Rights Act.

II.

I must also dismiss this action as against the Milwaukee Chief of Police, Harold A. Breier. I do so with the realization that an action, especially under the Civil Rights Act, should not be dismissed at the pleadings stage unless it appears to a certainty that plaintiff is entltled to no relief under any state of facts which could be proved in support of their claims. Escalera v. New York City Housing Authority, 425 F.2d 853, 857

* The two remaining defendants, Charles Gilbert and Dennis Kocher, have answered the complaint.

(2d Cir. 1970), cert. denied 400 U.S. 853 (1970); 2A Moore, Federal Practice ¶ 12.08, at 2271-2274 (4th ed. 1974).

In his complaint plaintiff only alleges that the defendant Breier was negligent in training and supervising Detectives Gilbert and Kocher. This is not enough. The doctrine of respondeat superior has no application to the civil rights statutes, for "{p}ersonal involvement is contemplated." Salazar v. Doud, 256 F.Supp. 220, 223 (D. Colo. 1966). The courts have consistently and uniformly held that police supervisory personnel, even though charged with selecting and training members of the force, cannot be held liable for damages to one injured by police misconduct absent direct personal action by the supervising officer. Jordan v. Kelly, 223 F.Supp. 731 (W.D. Mo. 1963); Sanberg v. Daley, 306 F.Supp. 277 (N.D. Ill. 1969). It is true that courts have construed complaints more liberally which seek equitable relief. United States v. Clark, 249 F.Supp. 720 (S.D. Ala. 1965), but here the plaintiff has not satisfied the burden of stating the specific, factual involvement of the defendant Breier to allow the court to order either monetary or equitable relief.

III.

I must also grant the motion for summary judgment of the defendants John Howard, Dennis Chipman, and Eugene Forster. In affidavits submitted by the defendants Chipman and Forster, it appears that although they were present at the time of plaintiff's arrest--Chipman having stayed in the reception area of plaintiff's

office and Forster having stayed in the patrol car--neither one participated in the serving of the arrest warrant (for operating an unregistered or improperly registered vehicle) on the plaintiff, or in the arrest of the plaintiff for either the warrant charge or for obstructing an officer. Plaintiff does not dispute this in his affidavit. There is no genuine issue as to these material facts.

It is clear that the defense of good faith and probable cause is available to police officers not only as a defense in a common-law action for false arrest and imprisonment but also as a defense to a § 1983 suit. Pierson v. Ray, 386 U.S. 547 (1967). The Supreme Court in Pierson stated at 555:

> "*** Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second Torts § 121 (1965); 1 Harper & James, The Law of Torts § 3.18 at 277-278 (1956); Ward v. Fidelity & Deposit Co. of Maryland, 179 F.2d 327 (C.A. 8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. ***"

The situation I examine here is one where the two Wauwatosa police officers were acting pursuant to an arrest warrant. They, however, did not particpate in the

actual arrest as plaintiff was arrested by Detectives Kocher and Gilbert of the Milwaukee Police Department. There is nothing in either plaintiff's complaint or his affidavit to show that Chipman and Forster, or their superior officer, Police Chief Howard, were acting in bad faith, used unreasonable force or violence, or subjected plaintiff to anything more than the indignity of being arrested. I am required as a matter of law to grant the motion for summary judgment of defendants Chipman, Forster, and Howard.

IT IS ORDERED that the motion of the defendant City of Milwaukee to dismiss this action as to it be and it hereby is granted granted.

IT IS FURTHER ORDERED that the motion of the defendant Harold A. Breier to dismiss this action as to him be and it hereby is granted.

IT IS FURTHER ORDERED AND ADJUDGED that this action be and it hereby is dismissed against the defendant City of Wauwatosa.

IT IS FURTHER ORDERED that the motion for summary judgment of defendants John Howard, Dennis Chipman, and Eugene Forster be and it hereby is granted.

Dated at Milwaukee, Wisconsin this 18th day of July, 1974.

/s/ John W. Reynolds
U. S. District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-472

NICHOLAS BUR,

Petitioner,

v.

HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER and DENNIS CHIPMAN,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS, HAROLD A. BREIER, CHARLES GILBERT AND DENNIS KOCHER, IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 472

NICHOLAS BUR,

Petitioner,

v.

HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER and DENNIS CHIPMAN,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS, HAROLD A. BREIER, CHARLES GILBERT AND DENNIS KOCHER, IN OPPOSITION

QUESTIONS PRESENTED

1. Is the doctrine of *respondeat superior* applicable to claims under 42 U.S.C. §1983?

2. Did the arrest by respondents Gilbert and Kocher, pursuant to an arrest warrant valid on its face, violate rights of the petitioner protected by 42 U.S.C. §1983?

3. Was the arrest of the petitioner by respondents Gilbert and Kocher effectuated with excessive force because the petitioner was placed in handcuffs?

STATEMENT OF CASE

The statement of facts applicable here is set forth in the District Court's Opinion which is included with the petition for review at A.9 through A.13.

Those facts can be summarized as follows:

On October 5, 1971, petitioner was issued a traffic citation and complaint charging him with a violation of Secton 341.04, Wisconsin Statutes. The citation notified the petitioner that he was required to appear in Branch 3 of the Milwaukee County Court at 8:30 A.M. on November 30, 1971. Petitioner failed to appear on that date. Upon petitioner's failure to appear, a County Judge from Milwaukee County ordered that a warrant be issued for his arrest. That warrant was issued on February 4, 1972.

On February 11, 1972, respondents Charles Gilbert and Dennis Kocher, officers of the Milwaukee Police Department, were dispatched to the respondent's place of employment for the purpose of arresting the respondent pursuant to the command of the warrant. Re-

spondents Gilbert and Kocher met with the petitioner, advised him of the existence of the warrant and placed him under arrest. During the course of the arrest, there was a limited struggle between the petitioner and the arresting officers, whereupon handcuffs were placed on the petitioner.

ARGUMENT

As is indicated by Rule 19 of this Court, a review on certiorari is not a matter of right, but of sound judicial discretion. Such review will be granted only where there are special and important reasons therefor. The character of reasons to be considered is set forth in Rule 19(b). The petition before the Court totally fails to demonstrate or discuss, within the guidelines of Rule 19(b), reasons why this Court should issue a writ of certiorari.

The arguments contained in the petition with respect to respondents Harold Breier, Charles Gilbert and Dennis Kocher are not sufficient to warrant the exercise of this Court's discretion in issuing a writ of certiorari.

I. APPLICATION OF THE DOCTRINE OF *RESPONDEAT SUPERIOR* TO RESPONDENT HAROLD A. BREIER IS NOT SUFFICIENT TO STATE A CLAIM UNDER 42 U.S.C. §1983

Petitioner, Nicholas Bur, does not assert that respondent Harold A. Breier, Chief of Police of the City of Milwaukee, personally participated in an alleged violation of rights secured by 42 U.S.C. §1983. Petitioner does not assert that said respondent had personal knowledge of, acquiesced in or ratified the alleged violations. Further, the petition contains no assertion that there was an affirmative link between the allegations of police misconduct and the adoption and enforcement of deliberate policies by said respondent showing his authorization or approval of such misconduct.

It can only be concluded that petitioner's request for the issuance of a writ of certiorari with respect to respondent Breier is predicated on the doctrine of *respondeat superior*. That doctrine as the basis for a claim under 42 U.S.C. §1983 was specifically rejected by both the District Court and the Seventh Circuit Court of Appeals (A. 4 and A. 33).

Support for the rejection of *respondeat superior* by the lower courts is found in *Rizzo v. Goode* (1976), 423 US 362, 46 L Ed 2d 561, 96 S Ct 598 wherein it is stated at pp. 375-377:

> "The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the ac-

> tions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in Hague and Medrano. Respondents posit a constitutional 'duty' on the part of petitioners (and a corresponding 'right' of the citizens of Philadelphia) to 'eliminate' future police misconduct; a 'default' of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the 'right' at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in §1983. We have never subscribed to these amorphous propositions, and we decline to do so now.
>
> "* * *
>
> "Respondents, in their effort to bring themselves within the language of Swann, ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two

respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as Swann and Brown were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their own conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. Under the well-established rule that federal 'judicial powers may be exercised only on the basis of a constitutional violation,' Swann, supra, at 16, 28 L Ed 2d 554, 91 S Ct 1267, this case presented no occasion for the District Court to grant equitable relief against petitioners."

Rejection of the application of *respondeat superior* to claims under 42 U.S.C. §1983 is contained in numerous decisions by Circuit Courts of Appeal. *Dunham v. Crosby* (1st Cir. 1970), 435 F 2d 1177, 1180; *Johnson v. Glick* (2nd Cir. 1973), 481 F 2d 1028, 1034, cert. den. 414 US 1033; *Adams v. Pate* (7th Cir. 1971), 445 F 2d 105, 107; *Jennings v. Davis* (8th Cir. 1973), 476 F 2d 1271, 1274; *Draeger v. Grand Central, Inc.* (10th Cir. 1974), 504 F 2d 142, 145.

On page 12 of his petition, petitioner suggests that respondent Breier was personally involved in the alleged violation of rights secured under the Constitution because he continued to sanction the criminal prosecution of the petitioner for 18 months after receiving a written notice of claim wherein petitioner asserted his innocence. The determination to institute or continue a criminal action or a forfeiture action is a determination properly made by a prosecutor, not by the Chief of Police.

II. THE ARREST OF PETITIONER BY RESPONDENTS GILBERT AND KOCHER PURSUANT TO A VALID ARREST WARRANT DID NOT VIOLATE THOSE RIGHTS OF PETITIONER SECURED BY 42 U.S.C. §1983.

With respect to respondents Charles Gilbert and Dennis Kocher, City of Milwaukee police officers, petitioner seeks a writ of certiorari to review the validity of his arrest by said respondents on February 11, 1972. That arrest was made pursuant to an arrest warrant issued by a Judge of the County Court of Milwaukee County after the petitioner failed to appear in that court in response to a traffic citation and complaint.

Petitioner has not asserted previously, nor does he assert here, that the warrant was in

any way defective. Rather, petitioner asserts that the arrest pursuant to the warrant was invalid because he was innocent of the charge contained therein.

It is respectfully submitted on behalf of respondents Gilbert and Kocher that petitioner's arrest pursuant to a valid warrant was lawful regardless of his guilt or innocence of the charge contained therein.

Support for this proposition requires little citation. It is stated in 32 *Am Jur* 2d, False Imprisonment, §67, at page 129:

> "An officer is protected and justified in executing process fair on its face — that is, process that is issued by a court, magistrate, or body having authority of law to issue process of that nature, is legal in form, and contains nothing to notify or fairly apprise the officer that it is issued without authority. If the process is fair on its face it matters not that it is irregular, and voidable for such irregularity. . . ."

See also Rule 4, Federal Rules of Criminal Procedure; *Morrison v. United States* (D.C. Cir. 1958), 262 F 2d 449; *Fleming v. McEnany* (2nd Cir. 1974), 491 F 2d 1353; *Mayer v. Moeykens* (2nd Cir. 1974), 494 F 2d 855, cert. den. 417 US 926.

Respondents Gilbert and Kocher had a duty to arrest the petitioner pursuant to the command of the court contained in the warrant.

As this Court stated in *Pierson v. Ray* (1967), 386 US 547, 18 L Ed 2d 288, 87 S Ct 1213 at page 556:

> ". . . A policeman's lot is not so unhappy that he must choose between being charged with dereliction of his duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. . . ."

III. USE OF HANDCUFFS IN EFFECTUATING HIS ARREST DID NOT VIOLATE PETITIONER'S RIGHTS PROTECTED UNDER 42 U.S.C. §1983.

In addition to the claim that his arrest on February 11, 1972, by respondents Gilbert and Kocher was invalid, petitioner asserts that the force used in effectuating that arrest was excessive because he was placed in handcuffs. As was indicated in the opinion of the Seventh Circuit Court of Appeals, petitioner admitted some physical resistance to the arrest (A.6), therefore, it is respectfully submitted that the minimal force used by respondents Gilbert and Kocher in placing handcuffs on the wrists of petitioner was warranted.

Even without physical resistance, the use of handcuffs by a law enforcement officer while making an arrest, without more, is not sufficient to state a claim under 42 U.S.C. §1983 irrespective of the validity of the arrest. Once a law enforcement officer determines that an

arrest is necessary, that officer has the obligation to insure that the custody of the individual arrested is maintained and that the safety of the person arrested, of other officers and of other people in the vicinity of the arrest is assured. The law enforcement officer should be the sole judge of the necessity for handcuffs, absent a claim that he abused the use of those handcuffs by intentionally inflicting physical injury.

CONCLUSION

Based on the reasons set forth herein, it is respectfully submitted on behalf of respondents Harold A. Breier, Charles Gilbert and Dennis Kocher that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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Petitioner,

-vs-

HAROLD A. BREIER, CHARLES GILBERT, DENNIS KOCHER and DENNIS CHIPMAN,

Respondents.

RESPONDENT DENNIS CHIPMAN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

CITATIONS

Cases:

STATUTES

TEXTS

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Dennis Chipman, one of the respondents herein, respectfully requests that the petition for Writ of Certiorari be denied.

QUESTIONS PRESENTED

Respondent Dennis Chipman disagrees with petitioner's statement of the issues presented and restates those issues relating to said respondent as follows:

1. Whether police officers who have in their possession an arrest warrant which was issued by a Court Commis-

sioner and which is valid on its face may be held liable for damages for:

(a) executing the warrant and disregarding the arguments of innocence and the purported evidence proffered at the scene of the arrest by the party named in the warrant;

(b) seizing and handcuffing the party named in the warrant where no injuries are alleged in the Complaint other than embarrassment.

2. Whether a police officer who did not participate in the arrest described above but who was present at the scene of said arrest which was made by officers from a neighboring city may be held liable for damages for disregarding the arguments of innocence and the purported evidence proffered by the person being arrested and for failing to interfere with the arrest and handcuffing of the person named in the arrest warrant?

STATEMENT OF THE CASE

Respondent Dennis Chipman incorporates the following statement of facts set forth in the June 23, 1976 Memorandum Opinion and Order of the District Court. (A. 9-13):

> "From the pleadings and papers on file in this case, and from the affidavits and documents submitted in support of and in opposition to the motion for summary judgment, the following facts appear: On October 5, 1971, the plaintiff was issued a traffic citation and complaint in the form prescribed by §345.-11, Wis. Stats. The citation and complaint was signed by Officer Carl Karwack, and charged the plaintiff with a violation of §341.04, Wis. Stats. The citation and Complaint further notified the plaintiff that he had to appear in Branch 3 of the Milwaukee County

Court, Room 635, Milwaukee County Courthouse, at 8:30 a.m. on November 30, 1971. The citation and complaint was subsequently sworn to before a Milwaukee County Court Commissioner, Herbert Schultz, on November 11, 1971, and filed with the clerk of court for the Milwaukee County Court on November 24, 1971.

The car the plaintiff was driving when he received the citation was a 1972 Chevrolet purchased 11 days earlier, on September 24, 1971, from the Humphrey Chevrolet Company. It appears that Humphrey Chevrolet undertook to arrange for the mechanics of transferring the title for the 1972 Chevrolet to the plaintiff. As is permissible in Wisconsin, the plaintiff physically transferred his license plates from a 1968 Ford, which was his "Trade-in" for the 1972 Chevrolet, to the latter vehicle. These plates expired at the end of September 1971, but the plaintiff believed that a title certificate was necessary before the registration plates on the 1972 Chevrolet could be renewed. Plaintiff nevertheless thought (and indeed, presently maintains) that operation of the 1972 Chevrolet on and after October 1, 1971, was sanctioned by §341.04(1)(a), Wis. Stats.:

> "A vehicle may be operated by a private person after the date of purchase of such vehicle by such private person * * * if application for registration and certificate of title is made."

The plaintiff asserts that he tried to explain the foregoing facts to Officer Karwack on October 5, 1971, but that Karwack nevertheless issued the citation and complaint. Thereafter, on October 18, 1971, the plaintiff received his title certificate for the 1972 Chevrolet, and mailed the title certificate, application form, and registration fee to the State of Wisconsin.

Plaintiff claims that he did not appear in Milwaukee County Court as directed by the citation and

complaint for two somewhat inconsistent reasons: (1) he had lost his copy of the citation, and (2) he had not yet received his new license plate stickers, and believed that until he had such stickers to display to the county court judge, the traffic citation would not be voided. Upon the plaintiff's failure to appear on November 30, 1971, Judge Louis J. Ceci ordered that a warrant be issued for his arrest. A warrant was subsequently issued, signed by Court Commissioner Herbert Schultz, on February 4, 1972. Although §345.37, Wis. Stats. provides that "[i]f the defendant fails to appear in court at the time fixed in the citation * * * (1) * * * the court may issue a warrant under ch. 968," it does not specify what provision of Chapter 968 is applicable. While §968.09, Wis. Stats. authorizes the issuance of a bench warrant of arrest upon a defendant's failure to appear as required, the warrant of arrest in this case appears to have been based on the substance of the citation previously issued to the plaintiff — i.e., a violation of §341.04, Wis. Stats. on October 5, 1971.

Meanwhile, on January 2, 1972, the plaintiff had received his certificate of registration and license plate stickers. On February 10, 1972, Officer Richard L. Kramer of the Milwaukee Police Department called the plaintiff at his home and informed him that the police department was in possession of a warrant for his arrest. At this point, the affidavits differ as to what next occurred: The plaintiff claims that he tried to explain the situation to Officer Kramer, whereupon Kramer hung up. Kramer, in turn, asserts that he advised the plaintiff that he could appear at either the Traffic Bureau or the Fifth District Police Station of the Milwaukee Police Department, and that failing a voluntary appearance, the warrant would be served upon the plaintiff at his home, at which time he would be taken into custody. Kramer further asserts that the plaintiff then stated that he would not voluntarily appear to answer the warrant. The plaintiff denies that Kramer told him of his option of voluntary appearance, or that he told Kramer he would refuse to so appear.

Thereafter, Officer Kramer forwarded the warrant for the plaintiff's arrest to the Warrant Detail of the Detective Bureau of the Milwaukee Police Department. The following day, February 11, 1972, Detectives Gilbert and Kocher appeared at the plaintiff's place of business, an office building located at 2747 North Mayfair Road, Wauwatosa, Wisconsin. They met the plaintiff in the reception area of the office building, advised him of the existence of the warrant, and placed him under arrest. Once again, the affidavits at this point differ as to what next occurred: The plaintiff maintains that he tried to explain the situation to the defendants, pointing out the certificate of registration in his possession and the then-current registration stickers on his car. When the defendants insisted on following through on the warrant, the plaintiff claims he stated that he would go along voluntarily. As he was putting on his coat, however, the plaintiff maintains that the defendants "grabbed and pulled" him, and then handcuffed him. The defendants, in contrast, claim that they allowed the plaintiff time to get his coat, and that only after a period of time had thereafter expired did they take the plaintiff by the arm to escort him from his office. The defendants assert that the plaintiff then started to struggle with them, whereupon he was placed in handcuffs. One of the attending Wauwatosa officers states that he entered the plaintiff's office after hearing shouting, and observed the plaintiff holding onto a desk and heard him shouting: "I am not going to go!" The plaintiff, in turn, denies holding onto a desk or making any such statement.

After being taken into custody, it appears that the plaintiff was detained for six and one-half hours before being released. Although the complaint states

> that the plaintiff was arrested not only for the registration offense upon which the warrant of arrest was based, but also for resisting or obstructing an officer, it does not appear that anything ever came of this latter charge. The registration offense was subsequently prosecuted, but eventually was dismissed by the district attorney on December 12, 1973."

The District Court Memorandum Opinion and Order from which the above facts are quoted was not concerned with the liability of Wauwatosa patrolman Dennis Chipman who had previously been dismissed from the lawsuit. (See the July 18, 1974 Decision and Order of the District Court dismissing Chipman, (A. 32-36)). Therefore, further clarification of patrolman Chipman's involvement is necessary. Additional facts gleaned from the pleadings and affidavits in support of and in opposition to patrolman Chipman's Motion for Summary Judgment are as follows:

On February 11, 1972, Wauwatosa Patrolmen Chipman and Forster met with Milwaukee detectives Gilbert and Kocher at 2747 North Mayfair Road, Wauwatosa, Wisconsin. The Milwaukee detectives had in their possession an arrest warrant issued against the petitioner, Nicholas Bur, for operating an unregistered or improperly registered motor vehicle. Wauwatosa patrolman Chipman along with the two Milwaukee police detectives entered the reception area of the State Farm Insurance building located at the above mentioned address and the City of Milwaukee detectives had Mr. Bur paged to come to the reception area where the arrest warrant was read to him by one of the Milwaukee detectives. Mr. Bur and the two Mliwaukee detectives then proceeded into the office area while Wauwatosa patrolman Chipman remained in the reception area. A few seconds thereafter Chipman heard shouting in the office area and entered

said area where he observed Mr. Bur holding onto a desk and heard him shout "I am not going to go!" The Milwaukee detectives then handcuffed Mr. Bur and escorted him out of the building to their City of Milwaukee police car and drove him to the Milwaukee jail. Patrolman Chipman did not struggle with, touch or participate in the arrest of the plaintiff.

The other Wauwatosa patrolman, Eugene Forster, did not enter the building but remained in a squad car in the parking lot located at the rear of the building. Patrolman Forster did not struggle with, ouch or participate in the arrest of the plaintiff.

Mr. Bur did not allege in his complaint any personal injuries other than embarrassment.

The District Court summarized the involvement of the Wauwatosa patrolman in its July 18, 1974 Decision:

> "I must also grant the motion for summary judgment of the defendants John Howard, Dennis Chipman, and Eugene Forster. In affidavits submitted by the defendants Chipman and Forster, it appears that although they were present at the time of plaintiff's arrest — Chipman having stayed in the reception area of the plaintiff's office and Forster having stayed in the patrol car — neither one participated in the serving of the arrest warrant (for operating an unregistered or improperly registered vehicle) on the plaintiff, or in the arrest of the plaintiff for either the warrant charge or for obstructing an officer. Plaintiff does not dispute this in his affidavit. There is no genuine issue as to these material facts.

The situation I examine here is one where the two Wauwatosa police officers were acting pursuant to an arrest warrant. They, however, did not participate in the actual arrest as plaintiff was arrested by detectives Kocher and Gilbert of the Milwaukee Po-

lice Department. There is nothing in either plaintiff's complaint or his affidavit to show that Chipman and Forster, or their superior officer, Police Chief Howard, were acting in bad faith, used unreasonable force or violence, or subjected plaintiff to anything more than the indignity of being arrested. I am required as a matter of law to grant the motion for summary judgment of defendants Chipman, Forster and Howard." (A. 34, 35 and 36)

ARGUMENT

The reason set forth by petitioner in support of his request for review on Writ of Certiorari is that the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by the Supreme Court of the United States.

Respondent Dennis Chipman respectfully submits to the court that none of the issues presented by the arrest of the petitioner, Nicholas Bur, and decided by the District Court and reviewed by the Court of Appeals are questions of first impression in the United States Supreme Court. Each of the issues involving respondent Dennis Chipman are governed by the rule set forth by the Supreme Court in *Pierson vs. Ray,* 386 U.S. 547, 557, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), that it is a defense to an action for damages against police officers under 42 U.S.C. 1983 that the officers acted reasonably and in good faith. The Supreme Court in *Pierson vs. Ray, supra,* stated:

> "We also granted the police officers' petition in No. 94 to determine if the Court of Appeals correctly held that they could not assert the defense of good faith and probable cause to an action under §1983 for unconstitutional arrest." 386 U.S. 547 at 551 and 552.

With respect to the issue raised by the police officers' petition, the court stated:

> "The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. Restatement, Second, Torts §121 (1965); 1 Harper & James, The Law of Torts §3.18, at 277-278 (1956); *Ward vs. Fidelity & Deposit Co. of Maryland,* 179 F.2d 327 (CA8th Cir. 1950). A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." 386 U.S. 547 at page 555.

The principle of law which governs the issues raised by the petitioner herein is set forth as follows in *Pierson vs. Ray, supra:*

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983." 386 U.S. 547 at page 557.

The defense of good faith offered by the Milwaukee police detectives and the Wauwatosa patrolman in the case at bar is stronger from a factual standpoint than the defense of the police officers in *Pierson vs. Ray, supra.* In the instant case, unlike the *Pierson* case, the arrest was made pursuant to a warrant issued by a Court Commissioner. The court in *Link vs. Greyhound Corporation,*

288 F.Supp. 898 (E.D. Mich. 1968) held that a sheriff could not be held liable for enforcing an arrest warrant against the plaintiff who subsequently sued for violation of 42 U.S.C. 1983, false arrest and malicious prosecution. The court stated at page 801:

> "As sheriff, Mr. Austin had the duty to take the warrant, whether or not properly issued, and arrest the plaintiff. The situation is quite analogous to that found in *Pierson vs. Ray, supra* . . ."

Further authority for the proposition that a police officer who acts in good faith and in a reasonable manner in executing a warrant issued by a judicial officer is not liable for damages under the Civil Rights Act, 42 U.S.C. §1983, is found in the following decisions: *Commonwealth of Pa. Ex. Rel. Feiling vs. Sincavagl*, 439 Fed.2d 1133 (3rd Cir. 1971); *Quinnette vs. Garland*, 277 F. Supp. 999 (C.D. Cal. 1967); *Anderson vs. Reynolds,* 342 F.Supp. 101 (D. Utah 1972).

It is fundamental under our constitution and laws that an arrestee may not be judged guilty of criminal conduct and punished by his arresting officers. Due process affords the arrestee his day in court. The petitioner's argument is converse to the above proposition in that he not only asks, but demands, that the arresting officers hear his case. Petitioner demands that the arresting officers disregard a warrant issued by a judicial officer for a past offense, based upon his arguments of present compliance with the statutory provision in question. As noted by the District Court in its June 23, 1976 Memorandum Opinion and Order:

> "The Constitution requires that an arrest be supported by probable cause. In the absence of a warrant, the probable cause determination must be made by the arresting officer. But where a warrant does exist, the existence of probable cause has previously been determined by a judicial officer, and the Constitution does not require that that determination be duplicated by the officer executing the warrant. If the person named in the warrant has a defense to the offense charged, that defense can in due course be presented to a judicial official. That the proper place for the arrestee to plead his cause is in court, and not to the officer whom the warrant authorizes and compels to make the arrest." (A. 20)

In further derogation of the petitioner's position is the invalidity of the defense which he offered to the police officers at the scene of the arrest. The Court of Appeals set forth the illogic of Mr. Bur's defense in footnote 2 of its decision:

> "Bur had purchased a new car in September 1971. In October of 1971, the traffic citation was issued for driving an unregistered vehicle. Bur could not register the car until he received his title papers. Under Wisconsin law, plaintiff maintains that a new car may be operated 'if application for registration and certification of title has been made.' Wisc. Stat. §341.04. The fact that Bur's car had been registered subsequent to the citation did not affect the facial validity of the warrant for the previous offense. Production of proof of registration to the arresting officers therefore could not in any way negate the good faith of the arrest." (A. 6)

Further United States Supreme Court authority governing the issues presented by petitioner is found in the decision of *Whiteley vs. Warden, Wyoming State Penitentiary, Wyo.,* 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), wherein the court stated at 401 U.S. 568:

> "Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the

magistrate the information requisite to support an independent judicial assessment of probable cause."

In the case at bar, neither the arresting Milwaukee police detectives nor the Wauwatosa patrolman who was present during the arrest issued the original citation and complaint. The citation and complaint was issued by Milwaukee police officer Carl Karwack. The citation and complaint was sworn to before a Milwauke County Court Commissioner and a Milwaukee Circuit Court Judge ordered that a warrant be issued for the petitioner's arrest when he did not appear in court as directed by the citation and complaint. Thereafter the warrant in question was issued by a Court Commissioner and sent to the Warrant Detail of the Detective Bureau of the Milwaukee Police Department. (A. 9-12)

The good faith defense set forth in *Pierson vs. Ray, supra,* extends beyond the arrest itself to petitioner's next argument that the use of handcuffs during the arrest amounted to excessive force.

Mr. Bur did not allege any personal injuries other than embarrassment in his complaint. The Court of Appeals dealt with the question of alleged excessive force as follows:

> "As to plaintiff's claim that the arrest was effectuated with excessive force, the district court noted that plaintiff only suffered an abrasion on his wrists from the handcuffs. In his deposition Bur conceded he gave some physical resistance (Dep. 22-23). Even without any resistance by an arrestee, the use of such minimum force is common in the course of an arrest. As the court observed, handcuffing cannot form the basis of a complaint under Section 1983 and, here, where there was admittedly some resistance, this conclusion follows *a fortiori. Taylor vs. McDonald,* 346 F.Supp. 390, 395 (N.D. Tex. 1972). (A. 6 and 7).

The District Court in its June 23, 1976 Decision relied not only on the decisions of other district courts finding no unconstitutional deprivation of civil rights where arrests involved touching and handcuffing, [*Daly vs. Pedersen,* 278 F.Supp. 88 (D. Minn. 1967) and *Taylor vs. McDonald,* 346 F. Supp. 390 (N.D. Tex. 1972)], but also cited the Supreme Court decisions of *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, L.Ed.2d 427 (1973) and *Gustafson vs. Florida,* 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 427 (1973) which held that a full search of the person may be conducted incident to every custodial arrest. (A. 23). The District Court pointed out that a full search of the arrested person is a greater intrusion upon that person than the use of handcuffs.

CONCLUSION

Respondent Dennis Chipman respectfully submits that the issues presented by petitioner and which were decided by the Court of Appeals are governed by principles of law previously enunciated by the Supreme Court of the United States that therefore the petition for Writ of Certiorari should be denied in this case.

Respectfully submitted,

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